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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RAYMOND J. DONOVAN, SECRETARY OF LABOR,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

JOE G. GARCIA,
Appellant,

v.

SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*,
Appellees.

On Appeals From The United States District Court For The Western District Of Texas

---

SUPPLEMENTAL BRIEF OF THE NATIONAL INSTITUTE OF MUNICIPAL LAW OFFICERS AS AMICUS CURIAE IN SUPPORT OF APPELLEES, SAN ANTONIO METROPOLITAN TRANSIT AUTHORITY, *et al.*

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INTEREST OF THE AMICUS CURIAE

This brief *amicus curiae* is filed pursuant to Supreme Court Rule 36.4 on behalf of the more than 1,700 local governments, which are political subdivisions of states, that are members of the National Institute of Municipal Law Officers [NIMLO]. The member local governments

operate NIMLO through their chief legal officers, variously called city attorney, county attorney, corporation counsel, city solicitor, director of law, and other titles. Each member local government has one vote on all actions taken by the NIMLO organization. This brief *amicus curiae* is signed by the chief legal officers of NIMLO members on behalf of their own local governments and the chief legal officers of the members of NIMLO in their official capacity. San Antonio, Texas is a member of NIMLO.

NIMLO is a nonpartisan, nonpolitical, fact-gathering and reporting organization that provides information and research to its member local governments on current legal problems of local concern, including mass transit labor issues and issues involving federal-local relations.

The local government attorneys who participate in NIMLO's work are responsible for negotiating and drafting labor contracts with municipal employee unions, including mass transit employee unions. The attorneys are also intimately involved in the budgetary processes of local governments and are responsible for advising local governments on the applicability of federal statutes and regulations to mass transit and other essentially municipal activities.

NIMLO reiterates the concerns mentioned in the statement of interest section of its original *amicus curiae* brief in these cases. In addition, NIMLO restates the fears addressed in the amicus curiae brief that it filed for this Court's consideration in *National League of Cities v. Usery*, 426 U.S. 833 (1976), namely that federalism principles, which define the constitutional order of this Nation, should not be ignored by expediency, especially where, as here, ignoring these principles would undermine

the foundation from which municipal governments can assert their federal constitutional rights.

While recognizing that application of those principles of federalism underlying *National League of Cities* can present difficulties for judicial and legislative bodies, NIMLO respectfully urges this Court not to abandon the wisdom of that decision, but to acknowledge its genesis as lying at the very roots of our constitutional system of government.

Consent to the filing of this brief has been granted by all parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

SUMMARY OF ARGUMENT

This supplemental *amicus curiae* brief is filed to address the question posed by the Court of " '[w]hether or not the principles of the Tenth Amendment as set forth in *National League of Cities v. Usery*, 426 U.S. 833 (1976), should be reconsidered?' "

The question reserved for reargument is misleading, if read as suggesting that the decision in *National League of Cities* is dependent solely upon the provisions of the Tenth Amendment. In fact, that decision is supported by general concepts of federalism that were written into the entire Constitution for the very purpose of preserving the role of the states within our system of government, even while increasing the authority of the national government to exercise delegated powers.

However, while the *National League of Cities* doctrine is valid and should be retained, the intended scope of the decision has resulted in some confusion about the application of the doctrine. Subsequent related decisions

have limited its application, and further clarification of the basic doctrine might be possible by distinguishing the objective inquiry regarding a potential constitutional problem from the subjective analysis of whether challenged legislation is unsupported. In the instant case, the two-step approach suggested by *National League of Cities* and its progeny requires a finding that the challenged application of the Fair Labor Standards Act to local mass transit operations is an impermissible intrusion by the federal government into constitutionally protected state and local prerogatives.

ARGUMENT

I. THE *NATIONAL LEAGUE OF CITIES* DOCTRINE IS BASED UPON BROAD CONSTITUTIONAL PRECEPTS OF FEDERALISM, NOT MERELY THE TENTH AMENDMENT AS THE QUESTION RESERVED FOR REARGUMENT WOULD SEEM TO IMPLY

Contrary to the implication drawn from the question posed by the Court for reargument, the decision in *National League of Cities v. Usery,* 426 U.S. 833 (1976), was not the result of an analysis of only the Tenth Amendment, but of federalism principles throughout the Constitution. The Tenth Amendment does embody these principles, but is, by itself and on its face, perhaps the least convincing proof of the framers' intent in developing our constitutional system of federalism. In fact, in the Court's *National League of Cities* opinion, the Tenth Amendment is mentioned only once,[1] and there is no indication that its

[1] 426 U.S. at 842, discussing the Tenth Amendment as a declaration of limits imposed more broadly by the federal system on the regulatory authority of Congress, as recognized by the Court in *Fry v. United States,* 421 U.S. 542 (1975).

existence was dispositive of the case. Instead, *National League of Cities* recognized both the importance of the Commerce Clause[2] and that it is but one provision in a Constitution embracing strong principles of federalism.[3]

As suggested by the decision in *National League of Cities,* while the power of the federal government today may necessarily be far greater than that of the states, it certainly is not an absolute power over state and local sovereignty. The Constitution is a document that expands federal power in some areas and limits it in other instances; the Constitution does not abolish state and local governments, nor are states relegated to serving as agencies of or ministers for the federal government. The states are not creatures of the federal government, but clearly do have an existence independent from the federal government.

And, as in *National League of Cities,* the instant case involves a question of federalism relative only to Congress' commerce power, not its spending power. It does not present a situation where the federal government has imposed conditions on the receipt of federal grants; instead, it deals with a doctrine involving the exercise of constitutional authority over state sovereignty independent of the spending power. The narrowness of the ruling in *National League of Cities* is demonstrated by its progeny, and that decision does not threaten either proper congressional action pursuant to the Commerce Clause or action pursuant to any other delegation of power to Congress. Neither a general erosion of federal power, nor an undue expansion

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[2]U.S. CONST. art. I, §8, cl. 3.

[3]*See EEOC v. Wyoming*, 103 S.Ct. 1054, 1081 n. 13 (1983) (Powell, J., dissenting).

of local autonomy can be attributed to this Court's decision in *National League of Cities.*

Therefore, the question presented by the Court for reargument could be construed wrongfully and dangerously, because the Tenth Amendment, by itself, does not automatically preclude an exercise of federal power within the states' domain. Rather, what *National League of Cities* stands for – and what abandonment of that decision would threaten – are fundamental constitutional principles of federalism, of which the Tenth Amendment is merely one component.

Federal supremacy is not federal absolutism. Abandonment of *National League of Cities,* however, would result in more than federal supremacy; it would result in the total elimination of independent state authority. The Court should acknowledge this threat and ask, instead, whether state and local governments must in all instances be obsequious to every federal pronouncement, regardless of the respective interests. The answer should be clear, and *National League of Cities* only preserves from federal encroachment those limited instances in which the federal interest, if any, must give way to the states' interest.

II. OUR CONSTITUTIONAL SYSTEM OF FEDERALISM WAS DEVELOPED WITH AN INTENT TO PRESERVE THE STATES' ROLES IN GOVERNMENT WHILE STRENGTHENING THE AUTHORITY OF THE NATIONAL GOVERNMENT.

The Constitution was designed by its framers to be a practical document, with a broad orientation and noninclusive statements of principles. Its practicality was imposed by the need for compromise in order to ensure its initial ratification, but this characteristic has also operated

to facilitate the so-created government's adjustment to changed conditions throughout the last two hundred years. This is the recognized genius of the American Constitution; it renders adaptation easier, thereby ensuring the flexibility of government within the parameters of broad principles.

But, while certainly the Constitution was created to displace power from the states and reposit it instead with the federal government, the Constitution did not remove *all* power from the states and situate *all* power with the federal government. The doctrine of *National League of Cities* has hardly returned the country to the days of the Articles of Confederation.

Derivatively, the very nature of federalism, as constructed within the Constitution, is not that of well-articulated theory. Instead, federalism is "the peculiar product of a peculiar people, who would rather work within its limitations and imperfections than sacrifice it for theoretical purity and administrative precision."[4]

The substance of federalism was not really debated during the Philadelphia Convention of 1787, and even subsequent contemporary discussions of the concept reflected disagreement about its significance.[5] However, clearly the founding fathers were committed to limited government, believing "that power divided is power inhibited; and that power inhibited is tyranny prevented."[6]

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[4]RICHARD H. LEACH, AMERICAN FEDERALISM 221-22 (1970).

[5]*Id.* at 7-8.

[6]*Id.* at 5.

Basic to any analysis of the concept of federalism is acknowledgment that the federal government was originally created by the states, and amendments to the Constitution which ordain the federal government's structure must be ratified by the states. The states had never intended to surrender their independent sovereignty to a federal government and would not have ratified any document proposing such ε usurpation.

Within the constitutional system of federalism then, states are not merely colorful blobs on a map of the country. They function, with or without federal aid, in areas of day-to-day concern to their inhabitants that the national government would be unable to administer. Public health, safety and welfare are largely dependent on state and local government police power exercises and services relating to such activities as enforcement, licensing, inspections and record keeping. While the role of the national government at times may be more urgent, the continued and increasing relevance of the role of state and local governments is evidenced in the instant case. As the demand for public services on the state and local levels increases, these governments must be prepared to meet the needs of their citizens.

State and local elected officials are not employees or agents of the federal government, and in some narrow areas the federal government may not dictate to them. It would be unconscionable and unconstitutional to permit, pursuant to the Commerce Clause, the federal government, for example, to dictate by statute the qualifications or salaries for state and local officeholders, eliminate all local schools or prohibit the enforcement of valid local laws. Just as certain individual rights exist not by virtue of specific textual authority but because of the tone of the

Constitution,[7] so do states, and local governments, retain certain rights.

While it may be true that the future of federalism depends largely on the satisfaction of the electorate with its performance, the legal mechanism protecting the concept must remain viable. The tone of the Constitution definitely indicates that certain powers are left to the states. The doctrine that has evolved from *National League of Cities* operates "to ensure . . . the unique benefits of a federal system"[8] and properly analyzes what powers are retained by the states.

III. THE *NATIONAL LEAGUE OF CITIES* DOCTRINE MAY BENEFIT FROM SOME CLARIFICATION.

As discussed above, the Court does not need to and should not abandon the principles enunciated in *National League of Cities.* However, it may wish to clarify the kinds of consequential effects that should be considered relevant in determining whether state sovereignty is threatened by a particular federal enactment and how serious those consequences must be in order to invalidate a federal statute. Clarification could be aimed toward the perceptions of *National League of Cities* as placing all-encompassing, flexible restraints on federal action, and of subsequent cases as defining narrow, rigid tests that disregard policy concerns.

A review of *National League of Cities* and its progeny offers a two-step approach for analyzing federal action

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[7]Such as: the right to privacy, *Griswold v. Connecticut*, 381 U.S. 479 (1965); and the right to educate one's children as one chooses, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

[8]*EEOC v. Wyoming*, 103 S.Ct. 1054, 1060 (1983).

that is challenged as unduly interfering with state and local prerogatives. The initial required inquiry focuses on whether a *National League of Cities* federalism problem can be identified. If so, the concern becomes whether the federal interference is warranted.

A. An Objective Test Utilizing *Hodel's* Threshold Requirements Could Be The First Step In Analyzing a *National League of Cities* Challenge To Federal Enactments.

The cases subsequent to *National League of Cities* have suggested the approach for finding the threshold requirements for this kind of federalism problem. Applying the tripartite test set forth in *Hodel v. Virginia Surface Mining and Reclamation Assoc., Inc.*, 452 U.S. 264 (1981),[9] it can generally be determined whether the nature of federal activity encroaches upon areas that the states had preempted for themselves. The three-part analysis utilized in *Hodel* will roughly identify the constitutional boundaries of federal Commerce Clause legislation implicating state and local affairs. Because the *Hodel* test is presented as being inclusive, the three parts need not be considered in any particular order; the failure to satisfy any one element of the standard could defeat a *National League of Cities* challenge to a federal enactment.

The tripartite *Hodel* examination of challenged federal legislation should be treated primarily as an objective test. Admittedly, the terminology of the standard as phrased

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[9]The test requires showing that the challenged enactment regulates "States as States", it addresses matters that are attributes of state sovereignty, and compliance with the enactment would directly impair the ability of state and local governments "to structure integral operations in areas of traditional governmental functions." *Id.* at 287-88.

presents difficulties in interpretation and opportunities for subjective analysis. However, the opportunities for subjectivity should be deferred until the final step of analysis,[10] and the difficulties in interpretation should be handled on a case-by-case basis.

For example, a simple, strict historical construction of the phrase "traditional governmental functions" within the *Hodel* standard, while appearing deceptively easy, could exclude evolutionary state and local activities that would seem worthy of constitutional protection. However, the ability of the Constitution itself to be adapted to changing needs is renowned, and while the task of defining constitutional rights and limitations so as to anticipate the unknown and unforeseen is formidable, it should not be necessary to abandon the attempt. By admitting the difficulty, rather than defeat, the flexibility required to avoid a static view of "traditional" functions becomes inherent in the test, and some room is preserved for reevaluation of a specific function in the future. Although such an approach might appear to invite continuous appeals in cases involving certain state and local activities, the actual number of appeals is likely to be limited by practical considerations and the obstacles defined in applicable precedents.

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[10]See the discussion on balancing the federal with state and local interests (III.B.), *infra*, p. 12.

B. Any Subjective Analysis Of Challenged Federal Enactments Should Be Reserved For The Second Step of Review, In Which The Respective Interests Of The Federal Government And State And Local Governments May Be Balanced.

The second step in a *National League of Cities*-style challenge to federal action is also alluded to in *Hodel:* "There are situations in which the nature of the federal interest advanced may be such that it justifies state submission."[11] This balancing approach, where the federal interest in imposing Commerce Clause legislation on state and local governments is weighed against their interests in avoiding compliance, has been referenced or implied in related decisions both preceding and following *National League of Cities,*[12] and, in fact, can be read into *National League of Cities,* as well.[13]

As the second step in a federalism challenge to Commerce Clause legislation then, the balancing of interests requirement would inevitably involve elements of subjectivity.

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[11] *Hodel,* 452 U.S. at 288 n. 29.

[12] *See, e.g., Fry v. United States,* 421 U.S. 542, 548 (1975) ("effectiveness of federal action would have been drastically impaired"); *United Transportation Union v. Long Island Railroad Company,* 455 U.S. 678, 689 (1982) ("would destroy the uniformity thought essential. . .and would endanger the efficient operation of the interstate rail system"); *EEOC v. Wyoming,* 103 S.Ct. 1054, 1062-64 (depends on "considerations of degree" after analysis of consequential effects).

[13] 426 U.S. at 846-47 (reviewing examples and the "degree" of interference), 853 ("limits imposed upon the commerce power . . .are not so inflexible as to preclude temporary enactments tailored to combat a national emergency").

Distinct objective/subjective testing phases, which are first suggested in *Hodel* but can also be detected in *National League of Cities,* were unfortunately blurred in *EEOC,* however, and the result is a corruption of constitutional federalism. Once the *Hodel* threshold requirements are satisfied and a *National League of Cities* federalism problem is identified, the balancing test requires that the federal interest must be shown to outweigh the state interest if the federal enactment is to be applied validly to state or local governments. Yet, *EEOC* might imply that some federal interest can always be found to justify federal intrusion into state and local prerogatives.[14] In effect, state and local governments opposed to Commerce Clause legislation would have an insurmountable burden of proof in order to protect and exercise their proper roles in the constitutionally prescribed federalism system.

Such a burden is patently unfair as well as unconstitutional. The elected representatives within state and local government, not Congress, are most closely associated with and accountable for decisions affecting state and local services. State and local elected officials can more effectively evaluate conflicting intrastate concerns about delivery of services, the value of employees, the desirability of tax increases, etc., than can federal representatives. In fact, federal elected officials can use legislation to increase their electoral popularity with the security of knowing that blame for concomitant reductions in state and local services will not be attributed to them.

Clearly, absent an overriding federal interest, state and local prerogatives in such areas of concern deserve the pro-

[14]103 S.Ct. at 1064 n.17 ("Once Congress has asserted a federal interest, and once it has asserted the strength of that interest, we have no warrant for reading into the ebbs and flows of political decisionmaking a conclusion that Congress was insincere in that declaration. . . .")

tection afforded by constitutional federalism. Should state and local compensation policies, for example, be perceived as undesirable to employees, those employees can seek new jobs within the private sector, where federal protection is properly accorded. On the other hand, if limited job markets operate to foreclose this option, it can be expected that dissatisfaction of employees will lead to poor performance, which in turn leads to complaints about service delivery for which the state and local elected officials will be held accountable. Therefore, the protection claimed to justify federal interference is intrinsic to state and local government without having to limit their prerogatives as to how best to utilize available resources. In any event, countervailing national interests, should they actually exist, can be accommodated through application of the balancing test.

National League of Cities and its progeny strike a proper balance between state and federal authority; where federal authority is necessary,[15] it is supreme. However, in some instances, the state and local interest is greater than the federal interest. *National League of Cities* assures the existence of a doctrine or rule of law that serves as a protection of state sovereignty in certain limited areas in which state and local governments can best advance the public interest.

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[15]"Undoubtedly the scope of this power [to regulate pursuant to the Commerce Clause] must be considered in light of our dual system of government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

IV. A *NATIONAL LEAGUE OF CITIES* FEDERALISM CHALLENGE DEFEATS THE APPLICATION OF THE FAIR LABOR STANDARDS ACT TO LOCAL MASS TRANSIT OPERATIONS.

As was asserted in *amicus curiae's* brief filed prior to the original argument before the Court in the instant case,

> Simply stated, the FLSA coerces state and local governments into structuring employment practices in a manner that is harmful to the best interests of the overwhelming majority of the citizenry. Faced with increased costs, public transit systems must raise fares or decrease services. Raising fares makes the system less accessible to those who need it most, the poor; raising fares also decreases ridership and thereby lessens the overall benefits of transit operations. Reducing services at a time when increased services are demanded is obviously not in the public interest.[16]

This statement, and its supporting facts in *amicus curiae's* initial brief, demonstrate that the general concept of federalism, which embodies the principles of the Tenth Amendment, exists for an important reason, that is, citizens must be able to protect against shortsighted, unreasonable, arbitrary or merely unwanted interference by the federal government with essentially local concerns.

While there is an obvious interstate commerce impact where the continuity of a nationwide railroad system is interrupted,[17] the interstate commerce concern connected with the instant case, involving a purely local mass transit

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[16]Brief of *Amicus Curiae,* National Institute of Municipal Law Officers, at 13.

[17]*Long Island Railroad,* 455 U.S. 678.

system, is not only not obvious, but nonexistent; the only commerce and concerns affected are local.

National League of Cities has created difficulties of interpretation, but its result was correct. Because the circumstances of the decision represented an exception rather than the rule, the language of the opinion is relatively broad. The task of conclusively anticipating the perceived scope of the decision would have been formidable, at best. However, while clarification was inevitable, some clarification is found in subsequent related decisions of the Court, each of which has narrowed the potential scope of *National League of Cities* without abandoning its essentially correct premise. Therefore, the Court should not now abandon the difficult, but fundamental, duty of preserving the cooperative federalism system as established in the Constitution generally; instead, it should recognize the inherent propriety of *National League of Cities* and continue to refine, as carefully and patiently as possible, the constitutional structure intended by our forebears.

> From time to time it has seemed as if a balance of power in the federal system has been struck, as if the best possible safeguards of individual freedom had been devised. But always the balance has shifted, and further shifts are inevitable. The debate about power and the quality of freedom within the federal system will very likely continue for a long time to come. It is proper that it should. For, as Professor Mason has observed, "Distrust of power at all levels, of whatever orientation, is still the American watchword. Eternal vigilance is still the price of liberty . . . Jefferson declared that 'the jealousy of the subordinate governments is a precious reliance.' " A century and a half later, Louis D. Brandeis thanked "God for the limitations in-

herent in our federal system . . . Conflict between federal and state authority means 'vibrations of power,' and this, Hamilton said, is the 'genius of our government.' " As long as the federal system helps make these vibrations possible, free government in the United States is secure -- and so is federalism itself.[18]

CONCLUSION

Because application of the Fair Labor Standards Act, 29 U.S.C. §§201-219 (1976 & Supp. V 1981), to local mass transit operations is an essential local service which lies within the parameters of constitutional protection against undue federal intrusion upon state prerogatives as recognized, and properly so, in *National League of Cities,* the National Institute of Municipal Law Officers respectfully urges this Court to affirm the decision below.

Respectfully submitted,

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[18]Leach, *supra* note 4, at 241-42 (quoting A.T. Mason, "Must We Continue the States Rights Debate?", 81 RUTGERS L. REV. 75 (Fall 1963)).

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